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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

vs.

CITY OF ARCADIA,

Appellee.

On Appeal From the California Court of Appeal
Second Appellate District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment require public entities to permit the distribution of newspapers by newsracks located on public property, under fair and reasonable time, place and manner restrictions?

2. May a public entity restrict the use of newsracks on public property by requiring newsracks to conform to arbitrary design restrictions which severely limit newsracks designed to distribute low circulation newspapers?

3. If a public entity elects to permit the use of newsracks on public property, may it require newsracks to conform to arbitrary design restrictions which severely limit newsracks designed to distribute low circulation newspapers?

4. If a public entity elects to permit the use of newsracks on public property, may it require all such newsracks to be of uniform appearance, even where such requirement will severely limit the distribution of low circulation newspapers?

5. If a public entity elects to permit the use of newsracks on public property, may it require all such newsracks to be under 48 inches in height, where there

is no evidence supporting the need for such height restriction, and the height restriction will severely limit the distribution of low circulation newspapers?

6. Where governmental regulations, such as newsrack design ordinances, restrict the exercise of First Amendment activities, such as the distribution of certain types of newspapers, and the governmental regulation is challenged, who has the burden of proving the reasonableness or unreasonableness of such governmental regulation? Does the governmental entity have the burden of showing the reasonableness of the regulation or does the party challenging the regulation have the burden of showing that it is unreasonable?

7. Where a party introduces uncontradicted evidence at trial showing that an ordinance restricting the design of newsracks will severely limit the distribution of certain types of newspapers, and such evidence is received by the trial court without objection, may a reviewing court refuse to consider such evidence as not worthy of belief?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

vs.

CITY OF ARCADIA,

Appellee.

JURISDICTIONAL STATEMENT

Appellants, Paul Duffy and Eunice Duffy, appeal from the final judgment of the California Court of Appeal, Second Appellate District, Division Two, dated March 31, 1987, which held that City of Arcadia Ordinance No. 1615 was constitutional under the First Amendment to the Constitution of the United States.

OPINION BELOW

The California Supreme Court has ordered that the opinion of the California Court of Appeal, which appears in the appendix hereto, p. A-15, *infra*, be published in the Official Reporter. (Appendix, p. A-27.) A citation to the Official Reporter is not yet available.

The judgment of the Los Angeles Superior Court,

JURISDICTION

Upon review of the trial court's judgment which held that Arcadia Ordinance No. 1615 did not violate the First Amendment to the United States Constitution in preventing appellants' from using Lowboy newsracks,[1] the California Court of Appeal, Second Appellate District, affirmed the trial court's judgment. The Court of Appeal's judgment was entered on March 31, 1987 (Appendix, p. A-15). Appellants, Paul and Eunice Duffy, filed a "Petition for Rehearing" which was denied on April 23, 1987. Thereafter, appellants sought review in the California Supreme Court. That Court denied appellants' "Petition for Review" on July 1, 1987. (Appendix, p. A-25.)

A Notice of Appeal to this Court was timely filed in the California Court of Appeal, Second Appellate District, on July 29, 1987. (Appendix, p. A-26.) This Court, per Order of Associate Justice Sandra Day O'Connor, extended the time in which to docket the appeal to October 29, 1987. (Appendix, p. A-28.)

This Appeal is being docketed timely within the period prescribed by statute and by the Rules of this Court. 28 U.S.C. Section 2101(c); *American Railway*

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[1] The term "newsracks" is synonymous with the term "newsboxes."

Express Co. v. Levee, 263 U.S. 19, 20-21. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *Williams v. Brufly*, 96 U.S. 176, 183 (1878).

CONSTITUTIONAL PROVISIONS AND CITY ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law • • • abridging the freedom of the press; • • •

Fourteenth Amendment, United States Constitution:

No State shall • • • deprive any person of life, liberty, or property, without due process of law; • • •

Arcadia Municipal Code Section 6439 (Ordinance No. 1615):

Unattended Newspaper Racks. The vending of newspapers from unattended coin-operated vending machine, hereafter referred to as a news rack, placed on a public sidewalk, shall be permitted in accordance with the regulations in this section:

• • •

(9) No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness.

• • •

(18) News racks shall have wood grain panels and the mount shall be painted gloss black.
(Appendix, pp. A-1, A-4, A-6.)

STATEMENT OF THE CASE

Appellants distribute low circulation newspapers by means of newsracks in Arcadia, California. In December, 1984, the City of Arcadia (hereinafter sometimes referred to as "Appellee") advised appellants that their newsracks violated Arcadia Ordinance No. 1615 (codified at Arcadia Municipal Code Section 6439) and instructed appellants to remove their newsracks to avoid seizure and removal of the newsracks by the City. On January 2, 1985, appellants filed the within action in the Superior Court for Los Angeles County. Appellants sought, *inter alia*, declaratory and injunctive relief under 42 U.S.C. Section 1983.

On January 2, 1985, the court issued its temporary restraining order restraining appellee from enforcing Ordinance No. 1615, and on February 27, 1985, the court issued its preliminary injunction restraining enforcement pending trial. Following a trial on January 29, 1986, the court declined to enjoin subsection 6439(9), the specific subsection which made appellants' newsracks illegal. Thereupon, the court dissolved the preliminary injunction. (Appendix, p. A-12.)

Appellants appealed the court's decision to the California Court of Appeal, Second Appellate District. Appellants also sought immediate relief from the Court of Appeal to restrain enforcement of the ordinance pending the appeal. The court summarily denied the requested interim relief. Appellants then sought and successfully obtained relief from the California Supreme Court restraining appellee from enforcing Section 6439(9) pending the appeal to the Court of Appeal.

On the appeal, the Court of Appeal affirmed the trial court's judgment, holding that Ordinance No. 1615 was facially valid. The court also held that the City was not required to articulate the specific purposes for the ordinance when it was enacted. On appellants' contention that the ordinance unconstitutionally required them to use an impractical and unworkable newsrack model, the court rejected appellants' evidence. The court stated that appellants' failed to carry their burden of establishing that the ordinance was an unreasonable restriction on free speech activities. (Appendix, p. A-19 - A-20, p. A-22.)

STATEMENT OF FACTS

Appellants are independent newspaper distributors. Appellants distribute numerous different publications which are published weekly or biweekly. Appellants

claim Arcadia's newsrack ordinance severely and unreasonably limits the distribution of low circulation newspapers. For such papers the only practical means of reaching their readers is newsracks.

As compared to the larger, daily publications, appellants' papers have different circulation needs. Their papers are sold almost entirely through newsracks. Virtually the entire circulation of the type of papers distributed by appellants depends upon independent distributors like appellants who rely almost exclusively upon newsracks. In short, the survival of the papers distributed by appellants depends upon newsracks.

Appellants use a newsrack model known as a "Lowboy."[2] Its distinctive feature is its ability to distribute two different publications from a single newsrack. This ability permits a Lowboy to distribute publications sometimes precluded (because of space restriction)[3] from distribution at a particular location. The Lowboy also greatly reduces distribution cost, thus

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[2] Two different manufacturers build Lowboys but Lowboys are identical regardless of manufacturer.

[3] Arcadia Municipal Code Section 6439(6) & (8) limits the location at which newsracks may be placed and the number of newsracks permissible at each such location.

0making it possible to distribute many papers otherwise unable to reach the public.

On its face, Appellee's Ordinance No. 1615 bars Lowboy newsracks because the racks are too high.[4] Lowboys are either approximately 53 or 61 inches high,[5] whereas the ordinance requires that all newsracks be no higher than 48 inches. (Section 6439(9), see Appendix, p. A-4.)

The only newsrack which satisfies all of the ordinance's design restrictions (height, width, depth, color, etc.) is a "Model 100." The Model 100 is not a viable alternative to the Lowboy. It is expensive, distributes only a single publication, is not designed for low-volume publications like appellants', and, because it requires more sidewalk space than a Lowboy to do the

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[4] In early August, 1987, after appellants filed their Notice of Appeal to this Court, appellee informed appellants that the City would allow 53 inch high Lowboy newsracks (Lowboy mounted on a 8 inch half-height mount). Appellee, however, still refuses to permit a 60 inch Lowboy (Lowboy mounted on a 16 inch full height mount).

[5] The difference depends upon whether the Lowboy is installed on a half-height (8 inch) or full height (16 inch) pedestal mount.

same amount of work, is not suitable for distributing all of appellants' papers. The cost of converting to Model 100s is prohibitively expensive for appellants. Hence, if appellants could not use Lowboys and had to use Model 100s, appellants could not distribute many of their papers.

Appellee did not directly attack any of appellants' evidence. Appellee made no objection to any evidence, and appellee did not offer evidence that a newsrack other than a Model 100 was available which qualified under the ordinance. Appellee did not contest appellants' showing that their papers' circulation could not absorb the expense of Model 100 newsracks. Appellee did not offer any evidence to rebut appellants' showing that the City permitted many fixed objects on its sidewalks (*e.g.*, traffic control boxes) which were higher and larger than appellants' newsracks.

Appellee claims that the Ordinance's 48 inch height restriction was enacted to prevent obstructions to vision, prevent visual clutter and promote uniformity of newsrack appearance.

Appellee presented no evidence justifying the selection of 48" as the maximum reasonable height for newsracks. Nor did Appellee present any evidence that Appellants' newracks were aesthetically less pleasing

than any other newsrack.

Appellants presented uncontradicted evidence at trial that the "only way" the smaller weekly or biweekly newspapers they distributed could reach the public were through "independent small companies" like Appellants and that "newracks are almost the exclusive means by which they circulate." "If the government disrupts this balance by restricting the smaller papers access to newsrack distribution or artificially imposing extra costs upon that distribution process, the process simply stops and the diverse variety of small newspapers disappears." Appellant also broke down his distribution costs and showed that he could not continue to distribute low volume newspapers if he had to use the type newsrack required by the Ordinance. Mr. Duffy declared that "I personally know of at least two former distributors of small newspapers who did quit distributing in Arcadia when this ordinance came in because they could not afford to comply with the new model requirements or to challenge them in suits: the Martynecs and the former Free Press distributor."

Even though there had been no objection to such evidence at trial and no contrary evidence, the Court of Appeal found Appellants' "purported evidentiary showing inadequate" because "grounded upon inadmissible hearsay." Relying on California Evidence Code section

412, the court declared that Appellants should have submitted declarations from the distributors who had been forced out of Arcadia because of the Ordinance and that Appellants' uncontradicted testimony regarding their own business was "vague, speculative, and conclusionary." (Appendix, pp. A-21--A-22.)

After thus rejecting the uncontradicted evidence which had been introduced without objection by Appellants at trial, the Court of Appeal concluded that Appellants had not carried their burden of "establishing that the ordinance as applied results in an unreasonable restriction upon the exercise of constitutional guarantees." (A-22.)

QUESTIONS PRESENTED ARE SUBSTANTIAL

"Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." (*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)). It appears that the time for the law of newsrack has arrived. Recently, this Court agreed for the first time to consider a case concerning the scope of constitutional protection afforded newspaper vending machines in the public forum. (*City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042).

In *Lakewood*, appellant challenges a rule almost

universally accepted by lower courts: newsracks are a constitutionally protected means of distribution under such cases as *Hague v. CIO* 307 U.S. 496 (1939) and *Lovell v. Griffin*, 303 U.S. 444 (1938).[6] Appellant in the *Lakewood* case argues that the value of newsracks as a disseminator of ideas is minimal, whereas the potential harm is great. (Appellant's Brief on the Merits, pp. 27-28, *City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042.)

Appellants herein submit that an pronouncement on the application of decisions like *Hague* and *Lovell* to newsracks should have the benefit of the facts in this case. Here, appellants' papers depend upon newsracks for their survival.[7] Appellants' papers need the most efficient and practical method available if the papers are to reach their readers. Through experience appellants learned that newsracks are that method, and in particular the double dispensing Lowboy newsrack

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[6] Examples of such lower court decisions are *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984), *Gannett Satellite Info. Network v. Town of Norwood*, 579 F. Supp. 108, 114 (D. Mass. 1984), and *Southern N.J. Newspapers v. New Jersey*, 542 F. Supp. 173 (D. N.J. 1982).

[7] In *Lakewood*, newsracks do not constitute a substantial part of the newspaper's circulation.

that they use.

A rule restricting or limiting the protection usually afforded newsracks probably will not imperil the existence of the *New York Times*. It could, however, sound the death knell for appellants' papers.

This case provides the Court with a valuable opportunity to weigh the claim of harm cause by newsracks. Appellants' Lowboy newsracks have been in Arcadia for years, and there has been no reports of a safety or traffic hazard or injury caused by the newsracks. Surely it is preferably for the Court to consider newsracks' asserted danger in a case where evidence was offered on this issue and considered by the courts.

Moreover, what should the protection be for newsracks where the City has opened its forum to newsracks? Few would disagree with the proposition that a governmental entity could not pass a law permitting only a certain type of newsrack on the basis that the government favors the papers distributed by that newsrack. To do so, would not result in an "uninhibited, robust" debate in the marketplace of ideas. (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252-53 (1974).)

But what if certain papers use only a particular newsrack model, and the governmental entity bans such

newsrack model while permitting another newsrack model generally used by established, less controversial publications. If the goal is to protect the marketplace of ideas, then surely there must be judicial scrutiny that does, in fact, provide realistic protection instead of simply indulging in presumptions designed to uphold the ordinance. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-70 (1981); *Schneider v. State*, 308 U.S. 147, 161 (1939).

It is highly unlikely that a municipality would choose to suppress a newspaper by the direct method of simply banning the newspaper. However, where as in this case particular newspapers rely on a particular method of distribution--Lowboy newsracks--and effectively ban (or at least severely hamper) the newspapers by banning their means of distribution, there should be protection designed to prevent the city from accomplishing through the back door what was not possible through the front.

Arcadia's ordinance may be content-neutral on its face, but the effect nevertheless is to drive out of Arcadia those smaller, less established newspapers that depend heavily upon Lowboy newsracks. Appellants submit that when the effect of an ordinance is to severely handicap the distribution of certain newspapers, the city must do more to justify its ordinance than create *post-hoc* reasons for its enactment. *Schad*,

supra; *see also Dills v. City of Marietta, Ga.*, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)

In this case the Court of Appeal accepted Arcadia's claims and rejected appellants' evidence on the severe hardships faced by their papers if Lowboys were excluded. The Court of Appeal's decision has set a dangerous precedent for a method of distribution which has just come into its own.

The court of appeal violated appellants' due process rights. Appellee chose not to rebut or object to appellants' evidence. Yet, the court of appeal rejected the evidence. (Appendix, pp. A-22.)

Additionally, the Court of Appeal's decision creates a conflict between a decision of the Federal Ninth Circuit. In California, there are now two different and conflicting sets of rules which can be invoked in analyzing the constitutionality of a restriction on newsracks. Under the Federal Ninth Circuit's opinion in *Jacobsen v. United States Postal Service*, 812 F.2d 1151 (9th Cir. 1987), a case involving restrictions on newsracks, the court stated "[t]he government . . . must justify reasonable time, place, and manner restrictions on the use of [public] sidewalks." (*Id.* at 1153.)

Under the state court of appeal's decision in the

instant case, however, the government does not have the burden of proof; the person challenging the restriction has the "burden of establishing that the ordinance . . . results in an unreasonable restriction upon the exercise of constitutional guarantees."

This type of conflict within the same state does not comport with either constitutional law or judicial policy. Individuals are entitled to pursue a 42 U.S.C. Section 1983 claim in state court. *Martinez v. California*, 444 U.S. 277 (1980). They should not be punished for doing so by having the burden of proof placed on them instead of the government. Furthermore, California's federal courts clearly have little interest in a state court decision which increases the federal caseload by encouraging plaintiffs to sue in federal court.

CONCLUSION

For the foregoing reasons, this Court should give plenary consideration to this appeal.

Respectfully submitted,

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ORDINANCE NO. 1615
AN ORDINANCE OF THE CITY OF ARCADIA AMENDING SECTION 6439 OF THE ARCADIA MUNICIPAL CODE PERTAINING TO UNATTENDED NEWSPAPER RACKS

THE CITY COUNCIL OF THE CITY OF ARCADIA DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 6439 of the Arcadia Municipal Code is hereby amended to read as follows:

"6439. Unattended Newspaper Racks. The vending of newspapers from unattended coin-operated vending machine, hereafter referred to as a news rack, placed on a public sidewalk, shall be permitted in accordance with the regulations of this section:

(1) No person shall install or maintain a news rack or mount therefor without first obtaining a permit from the Business License Officer and without complying with the regulations of this section.

(2) An applicant for a permit shall file with the Business License Officer an application which shall contain:

(a) The name, address and telephone number of the person who owns the business of placing and maintaining the news racks and mounts.

(b) The signature of the owner of the business.

(c) The location of each news rack and mount to be placed and maintained.

(d) The name of the newspaper to be sold from the news rack.

(e) Plans showing the proposed position of news racks and pedestals at a given location.

(3) The Business License Officer shall issue a permit to any applicant who complies with the regulations of this section.

(4) The permittee shall notify the Business License Officer in writing of any change in the name, status, telephone number or address of permittee as shown in the permit application within ten (10) days after such change takes place.

(5) The permittee shall maintain public liability insurance covering personal injury and property damages arising out of the use, ownership and maintenance of the news racks in the amount of $300,000.000 single limit per occurrence with the City of Arcadia named as an additional insured in a form and with content approved by the City Attorney. Evidence of insurance shall be filed with the City Attorney before the permit is issued. The insurance shall provide that cancellation shall be effective only after twenty (20) days' written notice thereof delivered to the Business License Officer of City.

(6) News racks shall not be placed:

(a) Within three (3) feet of any marked crosswalk.

(b) Within fifteen (15) feet of the curb return of any unmarked crosswalk.

(c) Within five (5) feet of any fire hydrant, fire call box, police call box or other emergency facility.

(d) Within five (5) feet of any driveway.

(e) Within five (5) feet ahead of and twenty-five (25) feet to the rear of any sign marking a designated bus stop.

(f) Within six (6) feet of any bus bench.

(g) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six (6) feet.

(h) Within three (3) feet of any area improved with lawn, flowers, shrubs or trees or within three (3) feet of any display window of any building abutting the sidewalk or parkway or in such manner as to impede or interfere with the reasonable use of such window for display purposes.

(7) News racks shall be so placed and maintained that they do not:

(a) Endanger the safety of persons or property.

(b) Interfere with any governmental use of the sidewalk.

(c) Unreasonably interfere with pedestrians, including persons leaving and entering motor vehicles.

(d) Interfere with the ingress or egress of private property.

(e) Interfere with the use of mailboxes or traffic signals.

(8) A news rack may be placed and maintained at a location selected by the applicant, provided it complies with the provisions hereof. A location as used herein means thirty (30) feet of public sidewalk.

(a) The thirty (30) feet may be linear in form in which it will parallel the length of the adjacent curb, or

(b) Form an L-shaped grouping where such a grouping may be deemed necessary by the Business License Officer.

(c) A location shall contain one or more lawfully maintained news racks, but not more than can be placed and maintained in accordance with the regulations of this section.

(d) A location shall be one hundred (100) feet or more from another location except that said one hundred feet shall not be measured across a street, other than an alley.

(9) No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness.

(10) News racks shall be placed adjacent and parallel to the wall of a building and not less than six (6) inches nor more than eighteen (18) inches from the wall, unless the Business License Officer determines that placement near a building is not otherwise in conformance with the regulations of this section, in which case he may authorize placement near a curb if such placement would be otherwise in conformance with the regulations of this section. News racks placed near the curb must be placed parallel to and no less than eighteen (18) inches nor more than twenty-four (24) inches from the edge of the curb. No news rack shall be placed or maintained on the sidewalk opposite another news rack.

(11) News rack mounts shall be bolted in place in accordance with specifications provided by the Public Works Department.

(12) No news rack shall be used for advertising signs or publicity purposes other than that dealing with display, sale or purchase of the newspaper sold therein. There shall be no advertising on wood grain panels.

(13) Each news rack and mount shall be maintained in a clean, neat and attractive condition and in good repair at all times.

(14) News racks or mounts not conforming to thirteen (13) above, may be cleaned or repaired by order of the Business License Officer and the owner

required to reimburse the City the actual cost of repair or cleaning if within ten (10) days after notice is mailed to the permittee to clean or repair, the permittee has failed to do so. Any permittee receiving such notice may, within said ten (10) day period, request in writing an informal hearing before the Business License Officer, the date, place and time of which shall be set by the Business License Officer.

(15) Each news rack shall display, in an easily readable manner, the current name and current telephone number of the permittee.

(16) The Business License Officer will have supervision over the placement, maintenance and removal of all publication vending machines on public sidewalks in the City of Arcadia.

(17) By January 1, 1978, each news rack shall be mounted on a separate pedestal conforming to the physical specifications kept on file by the Business License Office in the Finance Department, except those news racks presently legally existing on the sidewalks in conformance with subsection (24) herein which have modular mounts need not conform with the pedestal mount requirement of this subsection until December 1, 1978.

(18) News racks shall have wood grain panels and the mount shall be painted gloss black.

(19) All news racks on a tray mount must be of

the same type.

(20) Each vendor may have no more than two machines in any one location; in some instances, depending upon space available, the vendor may be limited to a single installation.

(21) The vendors shall pay the cost of the news racks and mounts and the cost of their installation.

(22) In the event a vendor desires to no longer vend in a specific location, seven days' notification must be given to the Business License Officer prior to removal of the news rack or mount.

(23) The Business License Officer may solicit other licensed vendors for requests to fill vacant positions. The selection will be made by lottery.

(24) Each news rack shall conform to the physical specifications kept on file by the Business License Officer in the Finance Department by January 1, 1978.

(25) Vendors will choose among themselves the contractor they wish to install the pedestals and news racks in conformance to this section.

(26) All news racks and mounts that do not comply with this section shall be moved to comply or removed from the public sidewalk.

(27) The installing contractor will be responsible for the collection of the fees. If the installing contractor is unable to reach a satisfactory arrangement with a vendor for the installation of the pedestal, the

contractor may eliminate that vendor from the location.

(28) Any news racks installed, used or maintained in violation of the provisions of this Section may be removed and stored in any convenient place by any officer of the City. Seven days prior to removal, written notice of the violation shall be given by attached notice of violation to the news rack and mailed to the permittee's address on file with the Business License Officer. Any person may request in writing within said seven-day period an informal hearing before the Business License Officer at a time, date and place to be specified by the Business License Officer. If the violation is not corrected during the seven (7) day period, the rack shall be removed, held as evidence or disposed of as unclaimed property in possession of the Police Department. The City Manager shall cause inspection to be made of any news rack reinstalled after removal under this subdivision. The permittee of said news rack shall be charged a ten dollar ($10.00) inspection fee for each news rack so inspected.

(29) In the event that nay news rack is abandoned or is not serviced with the publication it is designed to disseminate for a period of over seven (7) days, the City may remove same pursuant to the procedure set out in subdivision (28). Abandonment shall include but is not limited to circumstances where no publication is in the rack for a period of over seven (7) days.

SECTION 2. No person shall violate any provision, or fail to comply with any of the requirements of this ordinance. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this ordinance shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under any provision of this ordinance shall be punishable by a fine of not more than Five Hundred Dollars, or by imprisonment in the City Jail or County Jail for a period not exceeding six months, or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of the ordinance is committed, continued, or permitted by such person and shall be punishable accordingly.

SECTION 3. In addition to the penalties provided in the preceding Section, any condition caused or permitted to exist in violation of any of the provisions of this ordinance shall be deemed a public nuisance and may be, by the City, summarily abated as such, and each day such condition continues shall be regarded as a new and separate offense.

SECTION 4. If any section, subsection, sentence, clause, phrase or portion of this ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such

decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Arcadia hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 5. Neither the adoption of this ordinance nor the repeal hereby of any ordinance shall in any manner affect the prosecution for violation of ordinances, which violations were committed prior to the effective date hereof, nor be construed as affecting any of the provisions of such ordinance relating to the collection of any such license or penalty or the penal provisions applicable to any violation thereof, nor to affect the validity of any bond or cash deposit in lieu thereof, required to be posted, filed or deposited pursuant to any ordinance and all rights and obligations thereunder appertaining shall continue in full force and effect.

SECTION 6. The Clerk of the Council shall certify to the passage and adoption of this ordinance and shall cause the same to be published in the official newspaper of the City of Arcadia within fifteen (15) days after its adoption.

PASSED AND ADOPTED by the City Council of the

City of Arcadia at its regular meeting held on the 1st day of November, 1977.

SIGNED AND APPROVED this 1st day of November, 1977.

/s/ JACK SAELID

Mayor of the City of Arcadia

ATTEST:

/s/ CHRISTINE VAN MAANEN

City Clerk

MICHAEL H. MILLER, CITY ATTORNEY
CITY OF ARCADIA
240 W. Huntington Drive
Arcadia, California 91006
(818) 574-5407
BURKE, WILLIAMS & SORENSEN
PETER M. THORSON
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(213) 623-1900

Attorneys for Defendant,
CITY OF ARCADIA,

FILED
FEB 20 1986
FRANK S. ZOLIN, County Clerk
BY C. PENA, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY, Plaintiffs, vs. CITY OF ARCADIA, a Municipal Corporation, Defendant.	CASE NO. C 528746 JUDGMENT AFTER TRIAL BY COURT

The above action came on regularly for trial on January 29 1986, at 9:00 A.M. Plaintiffs appeared through their attorney, Linda T. Abrams, and defendant appeared through its attorneys, Michael H. Miller and

Peter M. Thorson. A jury trial having been duly waived, the Court having heard and considered the testimony and the argument of counsel, the matter having been submitted for decision, and a statement of decision not having been requested,

IT IS ADJUDGED THAT:

The defendant has prevailed on the grounds that:

1. Section 6439 of the Arcadia Municipal Code (as amended), pertaining to unattended newspaper racks is, except for Section 6439 (24), a valid ordinance, and does not violate the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution. The phrase "neat, clean and attractive" contained in the ordinance shall be construed as "neat and clean" so as to eliminate any subjective element of the term "attractive."

2. Defendant is, however, enjoined from initiating any enforcement proceedings based solely upon Subsection 24 of Section 6439 of the Arcadia Municipal Code.

3. Section 6439 of the Arcadia Municipal Code

does not violate the Sherman Antitrust Act, 15 U.S.C. Sections 1-7.

4. The City is not subject to and Section 6439 does not violate the Cartwright Act, Bus. and Prof. Code Section 16720.

5. Defendants shall recover costs in the amount of $_____ for costs and disbursements incurred herein.

6. The Preliminary Injunction is dissolved forthwith.

DATED: February 26, 1986.

/S/ Dowds

Honorable Norman Dowds

Judge of the Superior Court

Judgment entered on _____, 19__, in the Judgment Book, Volume No. _____, Page _____.

_____, Clerk

By_____, Deputy

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PAUL DUFFY and
EUNICE DUFFY,

Plaintiffs and
Appellants,

v.

CITY OF ARCADIA, a
municipal corporation,

Defendant and
Respondent.

B 019050

(Super.Ct.No. C528 746)

COURT OF APPEAL-SECOND DIST.
FILED
MAR 3 1 1987
CLAY ROBBINS, JR. Clerk
Deputy Clerk

Plaintiffs Paul and Eunice Duffy, newspaper distributors, appeal from the judgment entered in favor of defendant City of Arcadia (City) declaring that subdivision 9 of Arcadia Municipal Code section 6439, which sets a height limit for newspapers racks, is constitutional. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

In 1977, City adopted Municipal Code section 6439 to regulate the size, placement and condition of newspaper racks on its streets. Although plaintiffs then distributed newspapers in City, they brought no legal challenge to the newly enacted ordinance.

In 1983, City discovered that at an unknown time, plaintiffs had replaced their formerly conforming newspaper racks with 18 double deck newspaper racks at eight different locations in City. The new five feet high racks violated subdivision 9 of Arcadia Municipal Code section 6439 which states: "No news rack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness."

In 1984, City wrote to plaintiffs, informing them that the news racks violated the local height limits and asking them to remedy the matter.

Plaintiffs responded by filing suit for declaratory and injunctive relief, alleging the ordinance was unconstitutional on various grounds. The trial court

first issued a temporary restraining order in favor of plaintiffs and subsequently granted them a preliminary injunction. However, after a plenary trial on the merits, the superior court dissolved the preliminary injunction, concluded that the ordinance violated neither state nor federal constitutional guarantees, and entered judgment in favor of City.[1]

Plaintiffs thereafter appealed and sought from this court a writ of supersedeas to restrain City from enforcing the ordinance during the pendency of the instant appeal. We summarily denied the request whereupon plaintiffs sought relief in the California Supreme Court. That court issued a writ to restrain

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[1] Relying upon Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 305, the superior court construed subdivision 13 of the ordinance which mandates that news racks be "clean, neat and attractive" to merely mean "clean and neat" in order to eliminate any constitutional problems of vagueness and arbitrary application.

The trial court also enjoined City from enforcing subdivision 24 which states that each news rack "shall conform to the physical specifications kept on file by the Business License Officer in the Finance Department by January 1, 1978."

City does not contest either of those rulings.

City from enforcing the ordinance "to remove or to require the removal of [plaintiffs'] news racks" pending final determination of this appeal.

II.

DISCUSSION

While it is well settled that public distribution of newspapers and periodicals through news racks falls within the ambit of constitutional protections (Kash Enterprises, Inc. v. City of Los Angeles, supra, 19 Cal.3d 294, 302 and cases cited therein), it is equally well established that a local municipality retains authority to impose reasonable time, place and manner regulations upon the use of news racks so as to protect legitimate state interests. (Id., at pp. 302-303 and cases cited therein.) As the challenged portion of City's ordinance is undisputedly "content neutral," it will be upheld if clearly and narrowly drawn so as to avoid arbitrary and unnecessary curtailment of the constitutional guarantees of freedom of the press and freedom of speech. (Id., at p. 303.) And inasmuch as the thrust of plaintiffs' contention at trial was that application of the ordinance would result in an unreasonable limitation on the dissemination of protected ideas, we examine the evidence adduced therein.

The Arcadia City Council adopted the subject ordinance following a public hearing. Remarks from

both the City Attorney who explained the reasons for drafting of the ordinance and the City Council members who discussed the ordinance establish its general purposes were to improve public safety and to enhance the aesthetic quality of the City. Regulations to further those two goals fall within the permissible bounds of the police power of a city. (Metromedia Inc., v. San Diego (1981) 453 U.S. 490, 507-508; Southern N.J. Newspapers v. State of N.J. etc. (1982) 542 F.Supp. 173, 185; Philadelphia News, Inc. v. Borough C., etc., Swathmore (1974) 381 F.Supp. 228, 244.) And evidence was presented that news racks were available which would conform to the ordinance's requirements, a fact plaintiffs have never disputed.

On this appeal, plaintiffs place much emphasis on the fact that the City Council did not articulate each specific argument City now makes as to how the ordinance furthers those legitimate state interests. There is no such requirement. An ordinance need not recite all of the specific reasons for its enactment.[2] (5

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[2] Significantly, nothing in the record of the City Council proceedings indicates that the enactment of the ordinance was in any way prompted by inappropriate motives such as a desire to prevent the dissemination of "unpopular ideas," or an intent to drive particular individuals out of business.

McQuillan, Municipal Law, section 16.15, p. 141.)

At bench, it is self-evident a row of news racks higher than four feet could obstruct the view of a pedestrian, posed to step into the street, of low-riding sportscars or children on bicycles, or that those racks could make it difficult for drivers in the street to see a person emerging from behind them. Equally obvious is that the aesthetic quality of the environment could be improved by standardizing the size, shape, and maintenance of the news racks. We therefore conclude that, on its face, the ordinance passes constitutional muster as it was properly enacted to further legitimate governmental concerns and leaves open adequate alternative channels of communication. (Schad v. Mt. Ephraim (1981) 452 U.S. 61, 75-76.)

To avoid the force of this last conclusion, plaintiffs attempted to convince the trial court that application of the ordinance resulted in a constitutionally deficient law. In that regard, they urged that the City's prohibition on news racks higher than four feet precluded them from using double deck news racks which allegedly are more economically feasible for distribution of lesser known and established newspapers because two different periodicals can be

placed in one news rack.[3] While plaintiffs conceded that conforming one-level news racks were available from at least two different manufacturers, they asserted the purchase and installation of those racks would result in an increased cost of 50%. Moreover, they claimed that at six of their 18 news rack locations, no additional legal sidewalk space remained so that if they were forced to remove their double deck racks, half of the papers sold there would be forced to relocate to less commercially productive locations. Paul Duffy declared: "I personally know of at least two former distributors of small newspapers who did quit distributing in Arcadia when this ordinance came in because they could not afford to comply with the new model requirements or to challenge them in suits: The Martynecs and the former Free Press distributor."

We find plaintiffs' purported evidentiary showing inadequate. The last quoted declaration was patently grounded upon inadmissible hearsay. But of even more significance was plaintiffs' failure to tender declarations from the individuals referenced therein. These were people with whom plaintiffs were personally acquainted

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[3] Plaintiffs' argument in this regard is somewhat undercut by their concession that double deck news racks were originally designed to accommodate The Wall Street Journal and Barrons.

and who allegedly could have substantiated plaintiffs' claim that application of the ordinance resulted in an impermissible restriction on dissemination of constitutionally protected matter. However, plaintiffs, without explanation, offered no declarations or testimony from them. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, section 412.)

Viewed in this context, plaintiffs' earlier noted generalized claims that the increase in cost and relocation of news racks which would flow from compliance with the ordinance would unreasonably impinge upon the dissemination of ideas must fail as being vague, speculative, and conclusionary. At best, plaintiffs established that compliance with the ordinance may necessitate additional expenditures. But that fact, be it a fact, falls far short of discharging plaintiffs' burden of establishing that the ordinance as applied results in an unreasonable restriction upon the exercise of constitutional guarantees.

III.

The judgment is affirmed.

NOT FOR PUBLICATION */

_____, P.J.

ROTH

We concur:

_____, J.

COMPTON

_____, J.

FUKUTO

*/ On September 17, 1987, the California Supreme Court ordered the Court of Appeal decision published in the Official Reporter. See A-27

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 2 DATE: 04/23/87

Law Offices of Donald W. Cook
Donald W. Cook
1416 Second Street
Santa Monica, CA 90401

B019050

RE: Duffy, Paul and Eunice Duffy
vs.
Arcadia, City of (Et Al)

2 Civil B019050
Los Angeles No. C528746

APR 23 1987

PETITION FOR REHEARING DENIED

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B019050
S000942

SUPREME COURT
FILED
JUL - 1 1987
Laurence P. Gill, Clerk
DEPUTY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

DUFFY et al.

v.

CITY OF ARCADIA, etc.

Appellants' petition for review DENIED

/S/ LUCAS
Chief Justice

United States Supreme Court No. _____
California Supreme Court No. S000942
Court of Appeal No. 2d Civil B019050
Los Angeles Superior Court No. C 528 746

PAUL DUFFY and EUNICE DUFFY,

Appellants,

v.

CITY OF ARCADIA, a municipal corporation,

Appellees.

Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District
JUL 29 1987

Notice is hereby given that Paul Duffy and Eunice Duffy hereby appeal to the United States Supreme Court from the final judgment of the Court of Appeal entered March 31, 1987, hearing denied by the California Supreme Court on July 1, 1987, which affirmed the trial court decision that sustained the validity of City of Arcadia Ordinance No. 1615 under the First Amendment of the United States Constitution. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED:

/S/ Donald W. Cook
Donald W. Cook
Attorney for Appellants

No. 2/2 B019050/S000942

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 17 1987
Lawrence P. Gill, Clerk
DEPUTY

DUFFY

v.

CITY OF ARCADIA

On the recommendation of the Court of Appeal pursuant to Rule 978 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above-entitled case in the Official Reports. See subdivision (c) of Rule 978, California Rules of Court.

/S/ LUCAS
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. A-291

PAUL DUFFY AND EUNICE DUFFY,

Applicants,

v.

CITY OF ARCADIA, ETC.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and same is hereby, extended to and including October 29, 1987.

/S/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 14th
day of October, 1987.